



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 26, 2021

Ms. Evette Ugues
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2021-23454

Dear Ms. Ugues:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 901211 (File No. OP-21-0893).

El Paso County (the "county") received a request for the entire case file for a specified case number. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state, and provide documentation showing, you notified the deceased individual's next of kin of the request for information and of his right to submit arguments to this office as to why this information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

Initially, we note the county has only submitted autopsy photographs pertaining to the specified case number. To the extent any information responsive to the remaining portion of the request existed on the date the county received the request, we assume the county has released it. If the county has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 11 of article 49.25 of the Code of Criminal Procedure, which provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. . . . The records may not be withheld, subject to a discretionary exception under [the Act], except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with [the Act], but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Crim. Proc. Code art. 49.25, § 11(a). Upon review, we find some of the submitted photographs consist of photographs of a body taken during an autopsy. The county does not indicate either of the statutory exceptions to confidentiality is applicable in this instance. Thus, the submitted autopsy photographs are confidential pursuant to section 11 of article 49.25. Accordingly, we find the county must withhold the photographs at issue under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.¹ However, you have failed to demonstrate one of the photographs consists of a photograph of the body. Thus, the remaining photograph may not be withheld under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). However, because "the right of privacy is purely personal," that right "terminates upon the death of the person whose privacy is invaded." *Moore v. Charles B. Pierce Film Enters., Inc.*, 589 S.W.2d 489, 491 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); Open Records Decision No. 272 (1981) ("the right of privacy is personal and lapses upon death"). Nevertheless, the United States Supreme Court has determined surviving family members can have a privacy interest in information relating to their deceased relatives. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004) (surviving family members have right to personal privacy with

¹ As our ruling is dispositive, we need not address any remaining arguments against disclosure of this information.

respect to their close relative's death-scene images and such privacy interests outweigh public interest in disclosure).

The remaining information relates to a deceased individual. Therefore, it may not be withheld from disclosure based on the deceased individual's privacy interests. However, you state, and provide documentation showing, you notified the deceased individual's next of kin of the request for information and of their right to assert a privacy interest in the information at issue. As of the date of this letter, we have not received comments from the deceased individual's family asserting a privacy interest in the information. Thus, we have no basis for determining the family member's privacy interests in the information at issue. Accordingly, the county may not withhold any portion of the remaining information under section 552.101 in conjunction with constitutional privacy and the holding in *Favish*.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note the right to privacy is a personal right that lapses at death and the common-law right to privacy does not encompass information that relates only to a deceased individual. *Moore*, 589 S.W.2d at 491; *see also Justice v. Belo Broad. Corp.*, 472 F. Supp. 145, 147 (N.D. Tex. 1979) ("action for invasion of privacy can be maintained only by a living individual whose privacy is invaded" (quoting RESTATEMENT (SECOND) OF TORTS § 6251 (1977))); Attorney General Opinions JM-229 (1984) ("the right of privacy lapses upon death"), H-917 (1976) ("We are . . . of the opinion that the Texas courts would follow the almost uniform rule of other jurisdictions that the right of privacy lapses upon death"). Accordingly, information pertaining to a deceased individual may not be withheld on common-law privacy grounds. Upon review, we find you have not demonstrated the remaining information at issue is highly intimate or embarrassing to a living individual and not of legitimate public concern. Thus, the county may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, the county must withhold the submitted autopsy photographs depicting a body under section 552.101 of the Government Code in conjunction with section 11 of article 49.25 of the Code of Criminal Procedure. The county must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Pearlie Gault
Attorney
Open Records Division

PG/jm

Ref: ID# 901211

c: Requestor

Third Party